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CARL E. eCKERSTROM, A-1521, per se.,
Los Padres, W.,
California, 93401.

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FILED
JUN 4 1969
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SUPREME COURT

OF THE UNITED STATES

CORNER 17th AND PENNSYLVANIA AVE.

WASHINGTON, D. C., 20254.

CARL E. eCKERSTROM,
per se.,

Petitioner,

-v-

H.V. FIELD, SUPERINTENDENT,

Respondent.

CLERK'S NO. 196 [redacted]

A PETITION FOR LEAVE TO FILE A WRIT CERTIORARI FROM EXCESSIVE SENTENCE OF A STATE COURT.

ATTORNEY FOR RESPONDENT:

THOMAS C. LYNCH,
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Civic Center,
Sacramento, California.

PROPRIA PERSONNA

CARL E. eCKERSTROM
A-1521, Los Padres,
California,
93401.

SUPREME COURT OF THE UNITED STATES

TO: The Presiding and Associate Justices of the entitled above court, the petitioner, a state prisoner, seeks leave to file a writ of certioari for relief from excessive sentence from a state conviction.

RULE 23 OF THE SUPREME COURT

(a) A reference of the official and unofficial reports of the opinions delivered in the courts below is under seperate cover as provided by Rule (i) of these Rules.

(b) The groundsare based on the judgment of the courts and sentencing on the basis of the prison authorities.

(1) December 11, 1936, the Superior Court of California in and for the County of Imperial, on two counts of lewd and lascivious conduct in violation of Section 288 Penal Code, sentenced the petitioner to be sentenced to the State Prison at

Folsom, as the law prescribed, the two counts to run concurrently; on two prior convictions adjudged the petitioner to be an habitual criminal.

(i-a) February 8, 1944, the Board of Prison Terms and Paroles of California, fixed the term: "Adjudged habitual criminal; life; parole when 12 years served." (Without the aid of counsel to fix term)

(i-b) April 18, 1950, the California Adult Authority, after a parole violation, reset the petitioner's term back to its original maximum. (No counsel for defense)

(i-c) January 23, 1967, the Superior Court of California in and for the County of San Luis Obispo, ORDERED: "The Adult Authority shall disregard the habitual criminal status of Carl Eckerstrom because the Dyer Act is not one of the prior convictions as a basis for finding habitual criminality. (Page 4, lines 12--31) record.

(ii) As provided in (i) of this Rule,

the dates and opinions of the lower courts are submitted under seperate cover.

(iii) STATUTORY PROVISIONS BELIEVE TO CONFER JURISDICTION ON THIS COURT:

(I) Page 301, Federal Rules of Civil Procedure. (1966)

STATE COURTS: APPEALS: CERTIORARI.

"Final judgment or decree renedered by the highest court of the state in which decision could be had, may be reviewed by the Supreme Court as follows:

(2) By appeal, where is drawn the question the vailidty of any state statute on the grounds of its being repugnant to the Constitution, Laws or Treaties of the United States, and its decision is in favor of its validity.

(3) By writ certiorari, where the validity of a treaty of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the commission held or authority exercised under, the United States."

In the certified record on page 2, lines 12-13;--

"- - - of 28, U.S.C., Section 2241(c)(3), Federal questions to be asked, and on 8th Amendment, cruel and unusual punishment."

(c) QUESTIONS PRESENTED FOR REVIEW:

(1) Can a sentence be set against a prisoner without the presence or aid of counsel?

(2) Can a parole be suspended without a trial or the aid of counsel?

(3) Can the Adult Authority still hold a prisoner after a voided-term-set had been removed?

(4) Will the United States Supreme Court allow an ante-dated document to influence its judgment? (Exhibit page 9 record.)

(5) Can an adjudication which has affected the substantial rights of a prisoner be tolerated by the United States Supreme Court, and allow the State Courts to deprive a citizen of United States the equal protection of the laws?

(d) CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES.

(1) Page 53, CONSTITUTION OF THE STATE OF CALIFORNIA, AND OF THE UNITED STATES AND AMENDED DOCUMENTS (1966).

EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION:

BAILS: FINES: PUNISHMENTS;

Section 1. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.

(2) Page 55- FEDERAL RULES OF CIVIL PROCEDURE - (1966).

FOURTEENTH AMENDMENT

Citizenship, Representation, Payments of Public Debts.

CITIZENSHIP:

Section (1). All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No state shall make any laws or enforce any laws which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person within its jurisdication of life, liberty, or property, without due process of law;nor deprive any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have the power to enforce by appropriate legislation, the provisions of this Article.
(Proposed June 13, 1866; ratified July 9, 1868; certified July 28, 1969.)

(c) Concise statement of the case.

(1) December 11, 1938, by information filed by the district attorney, the Superior Court of California in and for the County of Imperial, sentenced the petitioner, as the law provides, on two counts of lewd and lascivious conduct, in violation of section 288 Penal Code, the terms to run CC, to the State Prison at Folsom; and on two prior convictions, adjudged the petitioner as an habitual criminal. (Without warning on the issue and without defense counsel.)

(2) February 8, 1944, the Board of Prison Terms and Paroles, at Folsom Prison, set the term: "Adjudged habitual criminal; Life; parole when 12 years served." (No attorney present while sentencing.)

(3) April 18, 1950, after a parole violation, (without counsel) the Adult Authority suspended the parole and returned the sentence back to the original maximum. (Exhibit "A" summary of sentence data on page 9, of the record.

(4) January 23, 1967, the Superior Court of California in and for the County of San Luis Obispo, ORDERED: "The Adult Authority shall disregard the habitual status of Carl Mckerstrom because the Dyer Act is not the proper basis for finding of habitual criminality. (Exhibit of order in actions by by the courts in separate cover.)

(5) After extraordinary writs, the courts maintain that the petitioner is not entitled to relief. (Decisions of the different opinions accompanied with this petition.

(6) The question involved which law the Board of Prison Terms and Paroles used in 1944 to set the term; and can a statute (1168)

which provides for entry of judgment without the consent of the petitioner, the presence of witnesses, nor counsel, be permitted to stand under the Due Process of Law provision of the Constitution?

(7) Review of petitioner's case by this Court:

(1) On page 1, of the record, lines 28 -31; "28 U.S.C., Section 2241 (c) (3) "Where a Constitutional question is involved, the court will examine into it."

(1) Excessive sentence without the aid of counsel;

(2) Parole suspended without the aid of counsel; (page 2, lines 1-7, the record)

(3) Still held after removal of term-set;

(4) Exception to antedated document;

(5) Substantial rights affected by errors.

Now, under the pertinent provisions of a new ruling of the United States Supreme

Court that a denial of legal counsel at sentencing is retroactive and can be heard, the petitioner respectfully submits:

Page 3, lines 21-30 of the record;

(c) Counsel required at sentencing:

"RETROACTIVE".

United States Supreme Court in Mempa v. Rhay, (-----) held

[illegible]

[illegible] Integrity of the [illegible] proceeding. The right to counsel at sentencing must be treated like the right to counsel at other stages of the adjudication."

McConnell v. [illegible]

Stillner v. [illegible]

Section 858 California Penal Code

"- - - at every stage of the proceedings."

(g) The petition was submitted to the United States District Court, Central District of California, filed under [illegible]-348-PH, February 19, 1968; Section 2254 (c) (3), Constitutional questions raised, and quote;

Title of Publication

In re; Osman V. United States., 148 F. 2 752; 325 U.S. 867;

"In speaking of the powers of the court to amend, modify or vacate a judgment," the court stated; "A sentence may be reduced after it has been partly served, but it may not be augmented.

"This is not a jurisdictional question. The rule is applicable to limitations that in criminal cases a sentence partly suffered (served) cannot be increased."

Martin's Crim. Pr. Civ. 9th Ed., Sec. 913.

United States V. Peary, U.S.C. Ct. 304, 306, 307.

Page 21, Lines 16 to 18.

"Also urge that the Subpena to obtain work record card, C.D.C. 103-1-(90904) from the California Men's Colony, west facility, San Luis, California, of Carl Robertson (1943- 1947) as provided in Sec. 1327 C.A.C.

(Those cards were not presented.)

(n) The California Supreme Court has decided the case in a way probably not in accord with applicable decisions of the United States Supreme Court;

(1) It allowed the term to be set without a defense counsel; Hempa V. Rhay--Due Process of Law requires defense at sentencing. (Page 3, lines 10-30, State Supreme Court certified record.)

(2) It allowed parole suspension without defense in violation of the due process clause of the Fourteenth Amendment.

(3) It allowed the Petitioner to be held after a term-set was declared void ab initio.

(4) It erred in allowing an antedated document as evidence at a hearning. (Page 9 of the certified court record.)

(5) It ignored the prejudicial errors which affected the substantial rights of the petitioner. (Page 6, lines 3--31, of the certified record.)

(i) Under seperate cover are the ACTIONS TAKEN FROM MAY 28, 1967, to December 2, 1968.

(j) July 19, 1967, in the Superior Court of California, in and for the County of Imperial the court decided; "-- from the defendant's numerous arrests and trials for various offenses, it appears to this court that the defendant was wellversed in knowing his constitutional right be represented by counsel at the time of entering his plea of guilty to the charges contained in Case No. 3106 of the 1936 Case. . . "

Since the District Court and Supreme Courts of California advanced no opinion, it is clear that none can be given.

The Imperial County Court's opinion is in the envelope marked SUPREME COURT OF CALIFORNIA. Dates from March 10, 1967, to July 19,1967.

In the preperation of this document, the petitioner has strived to comply with the rules of the Supreme Court, and hope that his effort makes some sense.

The petitioner is a man 72 years of age, has little legal knowledge, a cook by trade, and has a little over $3,000.00 (at maturity) In Government War Bonds, Series "E";knowing that a man with the ability to practice law in the Supreme Court expects a fee in accordance with such a profession; therefore the petitioner is going in on propria personna.

Respectfully submitted,

Carl E. Eckerstrom

Carl E. Eckerstrom, A-1521.
Los Padres, West.
California, 93401.

Dated This 25 day of April 1969.
Los Padres, California.

ATTORNEY FOR THE RESPONDENT:

Thomas C. Lynch, Attorney
General for the State of
California.
600 State Building,
Civic Center,
Los Angeles, California.

ACTIONS MAY 28, 1967 to DECEMBER 2,1968.

(1) May 28, 1967, Superior Court of California in and for the County of San Luis Obispo,"5163, "Order Granting Motion."

(2) June 27,1967, to July 19, 1967, The Superior Court of California in and for The County of Imperial on five hearings-/. with order of denial on case #332-3106. (Exhibits in adjoined envelope)

(3) November 24, 1967, the Superior Court of California in and for the County of San Luis Obispo,#5163 denial of writ.

(4-5) November 29 to January 24, 1968, both the District Court and the Supreme Courts of California denied without an opinion.

(6) August 1, 1968, the United States District Court, Central District of California, on # 68-248 FW, ORDER ANSWER TO PETITION FOR WRIT OF HABEAS CORPUS.

(7) August 12, 1968, Thomas C. Lynch, Attorney General of California, "EX PARTE MOTION FOR EXTENSION OF TIME TO RESPONSE."

(8) August 12, 1968, United States District Court; "ORDER GRANTING EXTENSION OF TIME TO RESPOND."

(9) August 29, 1968, "EXPARTE MOTION FOR EXTENTION OF TIME" by Volney V. Brown, Jr., Attorney for Petitioner on "68-248-FW, (California Statutes on last pages of petition)

(10) September 11, 1968, Thomas C. Lynch, Attorney General for the State of California, "RESPONSE FOR WRIT OF HABEAS CORPUS", #68-248-FW, Appended Exhibit "A" SUMMARY OF SENTENCE DATA OF CARL ECKERSTROM.

(11) September 18, 1968, Volney V. Brown Jr., Attorney for Petitioner, on #68-248-FW, MEMORANDUM OF POINTS AND AUTHORITIES.

(12) September 24, 1968, United States District Court, Central District of California, on #68-248-FW, "ORDER DENYING PETITIONS FOR WRIT OF HABEAS CORPUS, AND DISMISSING ACTION." (5pages)

(13) November 14, 1968, United States Court of Appeals, Petition "Undocketed."

(14) December 2, 1968, United States District Court, Central District of California, on #68-248-FW, "ORDER DENYING APPLICATION FOR RECONSIDERATION OF PETITION FOR CERTIFICATE OF PROBABLE CAUSE."

(15) March 26, 1968, the Supreme Court of California denied the writ of habeas corpus without an opinion.

On the 1st day of April 1968, the clerk of the Supreme Court of California mailed a certified copy of the petition to the petitioner, which is enclosed with the petition to the United States Supreme Court with this petition to Washington, D. C.

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IN THE

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October Term, 1969
No. 196

CARL E. ECKERSTROM, A-1521,

Petitioner,

vs.

H. V. FIELD, Superintendent, *et al.*,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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H. V. FIELD, Superintendent, *et al.*,

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

No published opinions have been filed in petitioner's case in connection with the issues he seeks to raise here. Several orders have been entered both in the state and federal courts and copies of these are forwarded as exhibits to be lodged with the court along with this response.

Jurisdiction

Petitioner recites a series of cases in the state and federal courts, but does not specify a particular order he is seeking to review. Possibly he is seeking to have reviewed an order of the California Supreme Court denying habeas corpus under 28 U.S.C. § 1257(3) or

an order of the United States Court of Appeals for the Ninth Circuit under 28 U.S.C. § 1254(1). After we give some chronology of the litigation we will review in more detail petitioner's right to review in this Court.

Statutes Involved

Petitioner appears to have sufficiently set forth any pertinent statutes or constitutional provisions.

History of the Case

In 1936 petitioner was convicted of a violation of two counts of California Penal Code section 288 (lewd and lascivious conduct), the terms to run concurrently. The court also found that petitioner came within the provisions of section 644 of the Penal Code (the habitual criminal act) due to two prior felony convictions. [Exh. pp. 27-28.]

On February 8, 1944, petitioner was granted parole after having served 12 calendar years. He was paroled January 5, 1949. He was still serving a maximum life sentence. [Exh. p. 52.]

On April 18, 1950, petitioner's parole was suspended. He was found guilty of parole violation and his parole was revoked. [Exh. p. 57.]

On July 16, 1956, petitioner was again paroled but still serving a maximum life sentence.

On July 31, 1958, petitioner's parole was again suspended. [Exh. p. 58.]

On January 24, 1967, the Superior Court of San Luis Obispo County granted habeas corpus and removed the finding of habitual criminality. [Exh. pp. 24-25.]

The United States District Court described petitioner's resulting sentence as follows:

> "Thus, petitioner is serving concurrent sentences only for the two violations of section 288 of the Penal Code which at the time of petitioner's conviction were punishable by not less than one year in prison. Where a penal statute provides only a minimum sentence, the maximum is life. People v. Camp, 42 Cal. App. 411, 425." [Exh. p. 65.]

Questions Presented

Petitioner appears to advance the following arguments:

1. That he should have had counsel when the Adult Authority set his term;

2. That he should have had counsel and a trial when his parole was suspended;

3. That the Adult Authority should not be allowed to keep him after his term was voided;

4. An antedated document was used against him.

Preliminary Statement

Of the many petitions filed, there appear to remain two possible roads to this Court that merit discussion.

The first involves a habeas corpus case brought in the United States District Court in Los Angeles. *Eckerstrom v. Field,* 68-248-FW. Petitioner made various complaints about his sentencing, counsel was furnished to him, memoranda were filed, and the District Court resolved the issues against him in an extended opinion. [Exh. p. 64.] He made some effort to appeal but has not secured a certificate of probable cause to do so.

See 28 U.S.C. § 2253. Petitioner made application to the Ninth Circuit Court of Appeal but in November of 1968 it was denied as premature so petitioner could first apply to the District Court. [Exh. p. 70.] Petitioner tells us that on December 2, 1968, the United States District Court entered an order denying reconsideration of the petition for certificate of probable cause. (Pet. p. 76.) It would appear that petitioner should be required to seek the certificate from the Ninth Circuit before that court's action should be reviewed since the only apparent action by that court was to deny the application as premature.

Petitioner also filed a petition for writ of habeas corpus in the California Supreme Court on March 21, 1969, which was denied on March 26, 1969. [Exh. pp. 71 *et seq.*] *See* 70 A.C. No. 14, Minutes, p. 2. (Petitioner gives a date of denial of March 26, 1968, but this appears to be a clerical error as to the year.)[1]

[1]The record before this Court may depend on whether the order of the State Supreme Court or the Ninth Circuit Court of Appeals is being reviewed, or whether the petition is treated as an application for habeas corpus.

ARGUMENT

I.

The Right to Counsel Does Not Extend to the Parole Process

Petitioner argues that he had a right to counsel both when his parole was revoked and also when his term was arrived at by the Adult Authority. He cites *Mempa v. Rhay,* 389 U.S. 128 (1967), "which extends to federal protection the California rule requiring the presence of counsel at the time of imposition of sentence after revocation of probation (see In re Turrieta (1960) 54 Cal. 2d 816, 819 [8 Cal. Rptr. 737, 356 P. 2d 681]) . . . ." *In re Cleaver,* 266 Cal. App. 2d 143, 161, 72 Cal. Rptr. 20.

Mempa involved revocation of probation where there was imposition of a deferred sentence. As the court noted at the outset of the opinion, the case involved "the question of the extent of the right to counsel at the time of sentencing where the sentencing has been deferred subject to probation." 389 U.S. at 130. The instant case involves the setting of a term by a prison board (the Adult Authority), and the revocation of parole. A parole proceeding differs from a probation proceeding in that the latter is conducted before a court.

The Adult Authority, in deciding to grant or revoke parole, is not constituted in a way that lends itself to according a right to counsel in this large group of cases. The situation thus differs from *Mempa* where this Court took care to point out that "counsel [and presumably the court] . . . would not be unduly burdened by being requested to follow through at the deferred sentencing stage of the proceedings." 389 U.S. at 137.

Requiring counsel would impose an excessive burden on the machinery of the administration of justice, outweighing any speculative benefit. *In re Marks,* 71 A.C. 33. Courts have expressed concern that such a requirement could discourage release of prisoners on parole. *See Williams v. Dunbar,* 377 F. 2d 505, 506 (9th Cir. 1967); *In re Marks, supra.*

It may fairly be stated that the decisions generally have declined to extend *Mempa* to proceedings before parole boards. *See Earnest v. Willingham,* 406 F. 2d 681, 682-683 (10th Cir. 1969); *Peinado v. Adult Authority of Department of Corrections,* 405 F. 2d 1185, 1186 (9th Cir. 1969); *Dunn v. California Department of Corrections,* 401 F. 2d 340 (9th Cir. 1968); *Williams v. Patterson,* 389 F. 2d 374, 375 (10th Cir. 1968); *Rose v. Haskins,* 388 F. 2d 91, 97 (6th Cir. 1968), *cert. denied,* 392 U.S. 946 (1968); *Hutchison v. Patterson,* 267 F. Supp. 433, 434-435 (D. Colo. 1967); *Williams v. Craven,* 273 F. Supp. 649, 650 (C.D. Cal. 1967); *cert. denied,* 393 U.S. 916 (1968); *Sorensen v. Young,* 282 F. Supp. 1009, 1010 (D. Minn. 1968); *In re Cleaver,* 266 Cal. App. 143, 161, 72 Cal. Rptr. 20; *see also Eason v. Dickson,* 390 F. 2d 585 (9th Cir. 1968), *cert. denied,* 392 U.S. 914 (1968); *Williams v. Dunbar,* 377 F. 2d 505, 506 (9th Cir. 1967), *cert. denied,* 389 U.S. 866 (1967); *Briguglio v. New York State Board of Parole,* 246 N.E. 2d 512, 515, 24 N.Y. 2d 21 (1969); *Beal v. Turner,* 454 P. 2d 624, 627 (Utah, 1969); *Johnson v. Stucker,* 453 P. 2d 35, 39, 203 Kan. 253 (1969).

II

Petitioner Was Only Entitled to Have the Excessive Portion of His Term Set Aside

Petitioner originally was sentenced to state prison on two counts of violating section 288 of the California Penal Code as well as a habitual criminal adjudication because of two prior felony convictions. [Exh. pp. 27-28.]

In 1967 the habitual criminal adjudication was set aside. [Exh. p. 25.] This reduced petitioner's effective term from a mandatory life sentence as provided in section 644 of the Penal Code to one year to life as inferred from section 288 as it read when he was convicted. Now he complains that he should not be held after the finding of habitual criminality is voided.

However, we agree with counsel who represented petitioner in the United States District Court with respect to his citation of *In re Kingsbury,* 74 Cal. App. 2d 959, 963, 170 P. 2d 82, which held that where the adjudication of excessive criminality is incorrect, the judgment is still valid for the main offenses charged and only void as to the excessive imprisonment imposed. [Exh. p. 62.]

The San Luis Obispo Superior Court subsequently held that the inaction of the Adult Authority operates to keep the term at maximum. [Exh. p. 51.] Permit us to emphasize, however, that "inaction" here is a conscious and thought-out act, and not a process of overlooking the case. The Adult Authority would regularly

review the case and its failure to lower the term is a form of action.

Although the fact was not before the federal courts or the State Supreme Court, it now appears that petitioner has had his term fixed and been granted a parole date [Exh. p. 88.] We have been advised that petitioner will be released on parole on February 24, 1970, and will be discharged three years later.

III

Petitioner Has Not Been Prejudiced by Any Antedated Document

Petitioner attacks what he calls an "ante-dated document." (Pet. for cert. p. 4.) His point is not entirely clear to us, but we assume he is referring to the summary of sentencing data. [Exh. pp. 57-59.] He has claimed that it is not accurate and that he is entitled to more credits. [Exh. p. 82.]

The United States District Court said the following:

> "There is no determined amount of accumulated credits which would entitle a prisoner sentenced to life imprisonment to release. It is therefore unnecessary to review the question respecting credits of petitioner, whether they be accumulated or invoked." [Exh. p. 68.]

If petitioner seeks to rely on the fact that his term is now set, it would appear to be appropriate to require him to present that fact to the courts below.

Conclusion

For the foregoing reasons it is respectfully requested that the petition for a writ of certiorari be denied.

Respectfully submitted,

THOMAS C. LYNCH,
Attorney General,
WILLIAM E. JAMES,
Assistant Attorney General,
JACK K. WEBER,
Deputy Attorney General,
By JACK K. WEBER,
Deputy Attorney General,
Attorneys for Respondent.